

1 Department's ability to seek reimbursement of Medi-Cal expenditures by recovering funds from all
2 types of annuities that are included in the estates of deceased Medi-Cal beneficiaries. Petitioner
3 believes that the content of these regulations is improper for various reasons, because, among other
4 reasons, they allow for recovery against annuities that are not part of a decedent's estate, which is not
5 permitted by federal law, they define annuities too broadly, and they allow for recovery against
6 annuities regardless of funding source.

7 2. Petitioner seeks to halt implementation of the regulations, because no legal basis exists
8 that would allow the Department to bypass the normal rulemaking process and promulgate the
9 regulations on an emergency basis. The regulations should not have been promulgated as emergency
10 regulations, because:

11 (1) The requirements of Welfare & Institutions Code § 14043.75 were not met, in
12 that there is no valid basis for claiming that these regulations were necessary to curtail fraud and abuse.

13 (2) The requirements of Government Code § 11346.1 were not met, in that there
14 could not be a valid finding that the adoption of these regulations is necessary for the immediate
15 preservation of the public peace, health and safety or general welfare.

16 3. Because the regulations at issue herein were not properly promulgated as emergency
17 regulations, Petitioner seeks a writ of mandate compelling the Department to withdraw the regulations
18 and to forego promulgation of the regulations unless the normal rulemaking procedures required by the
19 Administrative Procedure Act are followed.

20 THE PARTIES

21 4. Petitioner California Association of Senior Estate Planners ("CASEP") is a non-profit
22 trade association dedicated to supporting a network of professionals, such as lawyers, licensed
23 insurance agents, investment advisors, accountants and financial planners, who provide education,
24 guidance and financial and estate planning services to elderly persons. CASEP is an active advocate
25 regarding legislation, regulations and state policy that affects its members and their senior citizen
26 clients.

27 5. Respondent Sandra Shewry is the Director of the Department of Health Services, the
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1 single state Medicaid agency charged with administering California's Medicaid program known as
2 Medi-Cal. Welf. & Inst. Code §§ 14000 et seq. and 22 C.C.R. § 50000 et seq.

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5 **RELEVANT MEDICAID AND MEDI-CAL LAWS AND REGULATIONS**

6 6. The Medi-Cal program is California's version of the federal/state Medicaid program,
7 which furnishes health care benefits to the poor who satisfy certain eligibility requirements. See 42
8 U.S.C. §§ 1396 et seq. and Cal. Welf. & Inst. Code §§ 14000 et seq.

9 7. Pursuant to 42 U.S.C. § 1396p(b)(1), a State may, and must in certain instances, seek
10 recovery of medical assistance correctly paid to individuals under a State Medicaid plan, generally
11 individuals who were age 55 or older when receiving the services, from the estate of such individual
12 when deceased. Pursuant to 42 U.S.C. § 1396p(b)(4), a State may define "estate" in accordance with
13 the definition under the State's probate law, or may use an expanded definition of estate.

14 8. Pursuant to Section 3810.4 of the State Medicaid Manual, a State may impose estate
15 recovery against an annuity that was the property of a deceased Medicaid beneficiary. Such recovery
16 could not be made for deaths or estates opened sooner than the publication of this provision in the State
17 Medicaid Manual, which was published on January 11, 2001 and became effective February 15, 2001.
18 Further, such recovery against annuities could only occur for deaths or estates opened after the State
19 follows applicable state and federal law for appropriate notice and due process regarding its intention to
20 do so.

21 9. California Welfare & Institutions Code § 14009.5 requires the Department to claim
22 against the estate of a decedent for recovery of payments for the health care services paid for by Medi-
23 Cal that were received by the decedent, for services rendered when the decedent was 55 years or older
24 or for services rendered to the decedent as an inpatient in a nursing facility. This statutory provision
25 does not provide a definition of "estate" for Medi-Cal estate recovery purposes, nor does it address
26 whether recovery can be made against annuities.

27 10. California's regulations pertaining to Medi-Cal estate recovery are found at 22 C.C.R. §
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1 50960, et seq. Pursuant to 22 C.C.R. § 50960, California has adopted an expanded definition of estate,
2 specifically:

3 For individuals who die on or after October 1, 1993, and for payments
4 made on or after October 1, 1993, "estate" is defined as all real and
5 personal property and other assets in which the individual had any legal
6 title or interest at the time of death (to the extent of such interest),
7 including assets conveyed to a dependent, survivor, heir or assignee of
8 the deceased individual through joint tenancy, tenancy in common,
9 survivorship, life estate, living trust, or other arrangement.

10 Until the adoption of the emergency regulations that are the subject of this lawsuit, this provision did
11 not specify that the State could seek recovery against annuities in the estate of a deceased Medi-Cal
12 beneficiary.

13 11. Medi-Cal estate recovery is also addressed in Attachment 4.17-A of California's State
14 Plan Under Title XIX of the Social Security Act [Medicaid]. The State Plan includes the same
15 definition of "estate" as included in 22 C.C.R. § 50960, but does not specifically provide that recovery
16 may be made against annuities.

17 THE ADOPTION OF EMERGENCY REGULATIONS

18 12. Effective August 2, 2004, the Department promulgated emergency regulations,
19 designated as Regulation Package R-22-02E, amending 22 C.C.R. §§ 59060 and 59061. These
20 regulations add a definition of "annuity" to § 59060 and amend the definition of "estate" in § 59060 to
21 replace "other arrangement" with "annuities purchased on or after September 1, 2004." The regulations
22 also amend § 59061 to require that the Department assert a claim against annuities as part of a deceased
23 Medi-Cal beneficiary's estate.

24 13. The Department based its Finding of Emergency on Welfare & Institutions Code §
25 14043.75, which authorizes the Director of the Department, "in consultation with interested parties," to
26 adopt, amend or repeal regulations on an emergency basis in order "to prevent or curtail fraud and
27 abuse". The Department stated that "[a]ssets sheltered from estate recovery in annuities is a form of
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1 abuse of the Medi-Cal program.” Further, in its Finding of Emergency, the Department stated that the
2 regulation change was “deemed an emergency to protect the general welfare of the public, through
3 avoiding unnecessary losses of recoverable expenditures for Medi-Cal benefits and services and
4 thereby providing additional funds for needy Californians.” I

5 14. In its Finding of Emergency, the Department stated that the fiscal effect of the change in
6 regulations would be a “minimal savings to the state of approximately \$62,500.”

7 15. On information and belief, petitioner alleges that the Department has not amended the
8 State Plan to include a provision authorizing Medi-Cal estate recovery against annuities.

9 **THERE IS NO VALID BASIS UNDER STATE LAW FOR THE ESTATE RECOVERY**
10 **REGULATIONS TO BE PROMULGATED AS EMERGENCY REGULATIONS.**

11 16. Pursuant to the Administrative Procedure Act, Government Code §§ 11346, et seq., the
12 Legislature has established basic minimum procedural requirements for the adoption, amendment or
13 repeal of administrative regulations.

14 17. Pursuant to Government Code § 11346.4, there must be a public comment period on all
15 proposed regulations, with advance notice of at least 45 days of the close of the public comment period.
16 Government Code § 11346.5 establishes the requirements for the notice of proposed regulations, which
17 must include, inter alia, a statement of the time, place and nature of proceedings for the adoption,
18 amendment or repeal of the regulation, reference to the authority under which the regulation is
19 promulgated, and an informative digest containing a concise and clear summary of existing laws and
20 regulations related directly to the proposed action and the effect of the proposed action, as well as
21 various other requirements.

22 18. Pursuant to Government Code § 11349.3, the Office of Administrative Law (“OAL”)
23 must review all regulations after said regulations have been subjected by the issuing agency to the
24 notice and comment procedures and make determinations using the following criteria: necessity,
25 authority, clarity, consistency, reference and nonduplication. Pursuant to Government Code §
26 11349.3, OAL may disapprove the regulations, in which case it shall return them to the adopting
27 agency with a written statement of disapproval. If OAL approves the proposed regulations, then it shall
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1 forward them to the Secretary of State for filing.

2 19. Pursuant to Government Code § 11346.1, a regulation may be adopted as an emergency
3 regulation, without first following the notice and comment procedures, and the detailed review by
4 OAL, set forth above. Such action may be taken if the adopting agency makes a finding that “the
5 adoption of a regulation....is necessary for the immediate preservation of the public peace, health and
6 safety or general welfare.”

7 20. Welfare & Institutions Code § 14043.75 also provides the Director of the Department
8 “may, in consultation with interested parties, by regulation, adopt, readopt, repeal, or amend additional
9 measures to prevent or curtail fraud and abuse.” Such regulations may be deemed emergency
10 regulations in accordance with the Administrative Procedure Act and are exempt from review by OAL.

11 21. The Medi-Cal estate recovery regulations purporting to allow recovery against annuities
12 do not meet the criteria to be adopted as emergency regulations, in that:

13 (a) The exemption of annuities from Medi-Cal estate recovery cannot be considered
14 to be “fraud and abuse,” as required by Welfare and Institutions Code § 14043.75, because it has
15 always been perfectly legal for persons to have annuities treated as exempt assets for Medi-Cal
16 eligibility purposes and to have those assets protected for their heirs from recovery by the Medi-Cal
17 program after they are deceased.

18 (b) The exemption of annuities from Medi-Cal estate recovery cannot be considered
19 to be “fraud and abuse,” as required by Welfare and Institutions Code § 14043.75, because Medicaid
20 estate recovery against annuities is not even required by federal law, but is totally at the option of the
21 State. Since states are permitted by federal law to forego estate recovery against annuities, such a
22 practice cannot possibly be considered as “fraud and abuse.”

23 (c) The exemption of annuities from Medi-Cal estate recovery cannot be considered
24 to be “fraud and abuse,” as required by Welfare and Institutions Code § 14043.75, because, on
25 information and belief, the Department did not consult with interested parties before making the
26 decision to proceed with emergency regulations.

27 (d) The adoption of regulations to require estate recovery for annuities purchased on
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1 or after September 1, 2004 cannot be considered necessary to preserve the general welfare, since the
2 State has had the option for years to amend its regulations to allow for estate recovery against annuities,
3 but has chosen not to do so until now, with no change in circumstances.

4 (e) The adoption of regulations to require estate recovery for annuities purchased on
5 or after September 1, 2004 cannot be considered necessary to preserve the general welfare, because
6 additional funds collected as a result of this regulation change may not occur for years and because the
7 Department has only indicated that this change in policy will result in savings of \$62,500.

8 22. Petitioner has no plain, speedy, and adequate remedy in the ordinary course of law, other
9 than the relief sought in this Petition.

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13 **PRAYER**

14 WHEREFORE, Petitioner CASEP respectfully prays as follows:

15 1. That an alternative writ of mandate issue under the seal of this Court commanding
16 Respondent to withdraw Emergency Regulation Package R-22-02E and refrain from implementing the
17 new policies set forth therein until the full procedures for adoption of regulations pursuant to the
18 Administrative Procedure Act are followed, or to show cause before this Court why it has not done so
19 and why a peremptory writ should not issue;

20 2. After hearing on this petition, this Court issue a peremptory writ of mandate, pursuant to
21 Code of Civil Procedure §1085, directed to the Department:

22 a. Declaring that the Medi-Cal Estate Recovery regulations pertaining to recovery
23 against annuities were not validly promulgated as emergency regulations;

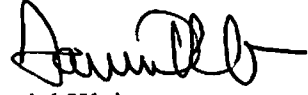
24 b. Requiring the Department to withdraw said regulations;

25 c. Prohibiting the Department from implementing said regulations without first
26 complying with the full procedures for adoption of regulations pursuant to the Administrative
27 Procedure Act.

- 1 3. For attorney's fees pursuant to Cal. Code Civ. Proc. §1021.5.
- 2 4. For costs of this proceeding and for such other and further relief as the Court deems just
- 3 and proper.

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5 Dated: 10/28/2004

Respectfully submitted,



Daniel Klein

Attorneys for Petitioner

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VERIFICATION

STATE OF CALIFORNIA, COUNTY OF ALAMEDA.

I have read the foregoing Petition for Writ of Mandate and know its contents.

I am a party to this action. The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and to those matters I believe them to be true.

I am an officer a partner President of CASEP, a party to this action, and am authorized to make this verification for and on its behalf, and I make this verification for that reason.

I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

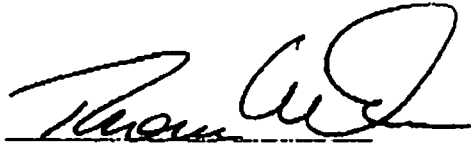
The matters stated in the foregoing document are true of my own knowledge except as to those matters which are stated on information and belief, and as to those matters I believe them to be true.

I am one of the attorneys for _____, a party to this action. Such party is absent from the county of aforesaid where such attorneys have their offices. and I make this verification for and on behalf of that party for that reason. I am informed and believe and on that ground allege that the matters stated in the foregoing document are true.

Executed on _____, at _____

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

Thomas Orr
Type or Print Name


Signature

1 **BILL LOCKYER**
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6 Attorneys for Respondent, Sandra Shewry

FILED
San Francisco County Superior Court

DEC 21 2004

GORDON PARK-LI, Clerk
BY: [Signature] Deputy Clerk

7
8 **SUPERIOR COURT OF CALIFORNIA**

9 **IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**

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11 **CALIFORNIA ASSOCIATION OF SENIOR**
ESTATE PLANNERS,

Petitioner,

12
13 v.

14 **SANDRA SHEWRY, Director of the Department of**
15 **Health Services, State of California,**

16 Respondent.

Case No. CPF 04-504694

JUDGMENT DENYING
PETITION FOR WRIT OF
MANDATE

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1 The petition for writ of mandate brought by the California Association of Senior Estate
2 Planners against certain emergency Medi-Cal regulations issued by respondent Department of
3 Health Services came on regularly for hearing on November 30, 2004.

4 David Hollander and Gary Lieberman appeared on behalf of petitioner; Douglas Press,
5 Supervising Deputy Attorney General, appeared on behalf of respondent.

6 After consideration of the petition, the memoranda and declarations in support and in
7 opposition, the Department's Request for Judicial Notice, the argument of counsel, and good
8 cause appearing, the court hereby ORDERS, ADJUDGES, and DECREES that the petition for
9 writ of mandate is denied and this action is dismissed with prejudice for the reasons set forth in
10 the court's order dated December 8, 2004, a copy of which is attached as Exhibit A to this
11 judgment.

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13 **IT IS SO ORDERED.**

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15 Dated: DEC 21 2004



Ronald E. Quidachay, Judge of the Superior Court
RONALD E. QUIDACHAY

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1 BILL LOCKYER
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6 Attorneys for Respondent, Sandra Shewry

FILED
San Francisco County Superior Court

DEC 08 2004

GORDON PARK III, Clerk
BY: [Signature] Deputy Clerk

7
8 **SUPERIOR COURT OF CALIFORNIA**
9 **IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO**

10
11 **CALIFORNIA ASSOCIATION OF SENIOR**
12 **ESTATE PLANNERS,**
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15 **SANDRA SHEWRY, Director of the Department of**
Health Services, State of California,
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Petitioner,

v.

Respondent.

Case No. CPF 04-504694

[PROPOSED] ORDER
DENYING PETITION FOR
WRIT OF MANDATE

1 The petition for writ of mandate brought by the California Association of Senior Estate
2 Planners against certain emergency Medi-Cal regulations issued by respondent Department of
3 Health Services came on regularly for hearing on November 30, 2004.

4 David Hollander and Gary Lieberman appeared on behalf of petitioner; Douglas Press,
5 Supervising Deputy Attorney General, appeared on behalf of respondent.

6 After consideration of the petition, the memoranda and declarations in support and in
7 opposition, the Department's Request for Judicial Notice, the argument of counsel, and good
8 cause appearing, the court DENIES the petition for writ of mandate and finds as follows.

9 1. The emergency regulations at issue here, designated as regulatory package R-22-02E
10 and which pertain to the Department's ability to collect from certain annuities as part of its Medi-
11 Cal estate recovery program, were issued by the Department to comply with a permanent
12 injunction entered in another action in this court, *California Advocates for Nursing Home Reform*
13 *v. Bontá* (2003) 106 Cal.App.4th 498 (*CANHR*). That published decision led to the entry of a
14 permanent injunction in the other action, which in turn compelled the Department to promulgate
15 the annuity regulations challenged here.

16 2. Although the permanent injunction in *CANHR*, entered in September 2003, required
17 the Department to issue the annuity regulations by December 1, 2003, the Department remained
18 out of compliance for over seven months.

19 3. The Department provided uncontroverted evidence that its seven-month non-
20 compliance was due to a variety of factors beyond its control, including: 1) the gubernatorial
21 recall and consequent change of administration in November 2003; 2) Governor
22 Schwarzenegger's subsequent issuance of Executive Order S-2-03, which stayed the
23 promulgation of all regulations for a period of 180 days; and 3) various difficulties in obtaining
24 all of the necessary approvals from the control agencies.

25 4. The uncontroverted evidence also shows that, due to the Department's non-compliance
26 with the *CANHR* permanent injunction, the *CANHR* petitioners began to threaten the Department
27 with a contempt motion and propounded written discovery in furtherance of that objective.

28 5. To immediately end its seven-month non-compliance with the *CANHR* permanent

1 injunction and obviate any further threat of contempt, the Department issued regulatory package
2 R-22-02E, the annuity regulations, as emergency regulations on July 27, 2004.

3 6. In its Finding of Emergency, the Department explained that it was necessary to issue
4 the annuity regulations on an emergency basis to comply with the *CANHR* permanent injunction
5 and to end "abuse" of the Medi-Cal program.

6 7. In its Finding of Emergency, the Department explained that, due to the State's severe
7 fiscal crisis, it also needed to start collecting against all recoverable Medi-Cal assets as soon as
8 possible. In this instance, as the Department explained in its response to written comments,
9 approximately \$250,000 in recoverable annuities was at stake.

10 8. In its Final Statement of Reasons (FSOR), dated November 5, 2004, the Department
11 also noted that "[i]n developing the proposed ER regulations, staff from within the Department,
12 including subject matter experts, met with estate attorneys and advocacy groups." (Vivian Auble
13 Declaration (Auble Decl.), Exhibit A [FSOR], at p. 3.) Petitioner provided no evidence to the
14 contrary about such a meeting.

15 9. Petitioner brought this challenge on October 29, 2004, after the Department had
16 conducted its notice of the emergency regulations, held the public hearing on them, and after the
17 comment and response period had closed.

18 10. The court judicially notices, pursuant to the Department's request, that the Department
19 filed its Certificate of Compliance to transform the emergency annuity regulations into
20 permanent regulations with the Office of Administrative Law on November 19, 2004. (Gov.
21 Code, § 11346.1, subd. (e).)

22 Accordingly, the court holds as follows:

23 "What constitutes an emergency is primarily a matter for agency discretion." (*Carmen Doe*
24 *v. Wilson* (1997) 57 Cal.App.4th 296, 306, quoting *Schenley Affiliated Brands Corp. v. Kirby*
25 (1971) 21 Cal.App.3d 177, 194-195.) Thus, while the court is "not necessarily bound by an
26 agency's determination of the existence of an emergency, . . . the court must accord *substantial*
27 *deference* to this agency finding, and may only overturn such an emergency finding if it
28 constitutes an abuse of discretion by the agency." (*Carmen Doe, supra*, 57 Cal.App.4th at p. 306

1 [emphasis in original].) As *Carmen Doe* held, “[t]he term ‘emergency’ under California law is
2 not necessarily limited to a ‘crisis situation’ and encompasses ‘an unforeseen situation calling for
3 immediate action.’” (*Carmen Doe, supra*, 57 Cal.App.4th at p. 311 fn. 8, quoting *Sonoma
4 County Organization etc. Employees v. County of Sonoma* (1991) 1 Cal.App.4th 267, 276.)
5 *Carmen Doe* further explained that “the pendency of a change in the legal environment, and the
6 lack of time to promulgate regulations in the normal way, may justify the agency in proceeding
7 by emergency regulations.” (*Id.* at p. 306.)

8 The court holds that the Department did not abuse its discretion when it issued the annuity
9 regulations on an emergency basis, and the Department’s actions satisfy the standard articulated
10 in *Carmen Doe v. Wilson*. The circumstances surrounding the Department’s issuance of
11 emergency annuity regulations arose from a “change in the legal environment” that also
12 constituted “an unforeseen situation calling for immediate action,” which then led to “the lack of
13 time to promulgate regulations in the normal way.”

14 The *CANHR* appellate reversal in 2003, which led to the stipulated permanent injunction in
15 that case and the legal compulsion requiring the Department to promulgate the annuity
16 regulations, constituted a “change in the legal environment.” In addition, the gubernatorial recall
17 and consequent Executive Order from the new Governor halting the further promulgation of all
18 state regulations, the Department’s difficulty obtaining various approvals for its annuity
19 regulation package, and the *CANHR* petitioners’ threat of contempt constituted an “unforeseen
20 situation calling for immediate action.” These same circumstances also left the Department with
21 a “lack of time to promulgate regulations in the normal way.” (*Carmen Doe, supra*, 57
22 Cal.App.4th at p. 306.)

23 The court finds that the Department was further warranted in proceeding initially by way of
24 emergency regulations in order to curtail “abuse” of the Medi-Cal estate recovery program, as
25 that term is defined in Welfare and Institutions Code section 14043.1, subdivision (a)(1). In this
26 instance, allowing heirs of deceased Medi-Cal beneficiaries to continue to receive recoverable
27 assets that would otherwise be returned to the Medi-Cal program constituted an “abuse” of the
28 Medi-Cal program. Issuing emergency regulations, making it clear that annuities would be a


1 recoverable asset, ended this abuse. The Department also noted that, under Welfare and
2 Institutions Code section 14043.75, subdivision (a), when the director seeks to prevent or curtail
3 "fraud and abuse" through regulatory means, those regulations: 1) "shall be deemed emergency
4 regulations," and 2) "shall be deemed necessary for the immediate preservation of the public
5 peace, health and safety, or general welfare." The court finds the Department did not abuse its
6 discretion in its attempt to end this Medi-Cal "abuse."

7 Finally, with regard to the petitioner's technical and other concerns about the emergency
8 regulations, the court notes that every one of the defects alleged in the petition had been already
9 raised and commented upon by the Department during the oral and written comment and
10 response phase. (Compare petitioner's concerns about the use of the terms "policy" and
11 "contract" with the Auble Decl., Exhibit A [FSOR, Addendum 2], at p. 5 [Issue No. 11]; as to the
12 issue of how assets that may pass to heirs might be "technically inaccurate," see the Auble Decl.,
13 Exhibit A [FSOR, Addendum 2], at pp. 5-6 [Issue No. 13]; and as to petitioner's "potential
14 problem" in the manner that title 22, California Code of Regulations, section 50961, subdivision
15 (g), may exceed the scope of federal law by requiring recovery of "annuities [that are] part of a
16 deceased Medi-Cal beneficiary's estate," see Auble Decl., Exhibit A [FSOR, Addendum 2], at p.
17 6 [Issue No. 14]; and as to petitioner's "tax planning" concerns, see Auble Decl., Exhibit A
18 [FSOR, Addendum 2], at p. 6 [Issue No. 15]; petitioner's objections to the Department's
19 issuance of annuity regulations on an emergency basis were also raised in the comments and
20 responded to, see Auble Decl., Exhibit A [FSOR, Addendum 2], at pp. 1-2, 3 [Issue Nos. 1, 5].)
21 Thus, petitioner's same concerns with the emergency regulations were heard by the Department
22 before the instant petition was filed.

23 The petition for writ of mandate is therefore DENIED, and this matter is dismissed with
24 prejudice.

25 **IT IS SO ORDERED.**

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27 Dated: 12/8/04


Ronald E. Quidachay, Judge of the Superior Court
RONALD E. QUIDACHAY

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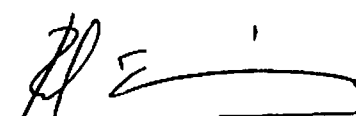
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RONALD E. QUIDACHAY

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